174 (3) OCT 28 2010

No. 10-408

In the Supreme Court of the United States

GLACIER ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

THE ESTATE OF SCOTT SHERBURNE, RON BIRD AND HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

REVIEW OF THE NINTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

At issue is a *sua sponte* ruling that issue preclusion bars consideration of injunctive relief where a tribal court has ordered enforcement of a money judgment against non-Indian assets, even where the trial lacked due process. *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001).

In *Bird,* a comity proceeding, GEC did not appeal tribal court subject matter jurisdiction under the two exceptions in *Montana v. United States,* 450 U.S. 544, 564-66 (1981), concentrating instead on the lack of due process. A consideration of the tribal court's jurisdiction to enforce the judgment *on its own* was not necessary to the decision not to extend comity. That is self-evident from the decision: "we do [not] address whether there may be further proceedings in the tribal court." *Id.* at 1139 n.2. The Ninth Circuit held that the lack of due process *alone* prevented federal recognition and enforcement of the tribal judgment. *Id.* at 1152. Now, GEC's failure to appeal the issue of tribal subject matter jurisdiction in that proceeding has been given preclusive effect in GEC's action for injunctive and declaratory relief from tribal court orders allowing enforcement of the money judgment, notwithstanding the lack of due process.

Due process is "perhaps the most majestic concept in our whole constitutional system." *Joint Anti-Facist Refugee Comm. v. McGrath,* 341 U.S. 123, 174 (1951). "[W]here no judicial resources have been spent on resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte,* thereby eroding the principle of [due process] so basic to our system of adjudication." *Arizona v. California,* 530 U.S. 392, 412-13 (2000). The *sua sponte* ruling in district court gave GEC no chance to brief this issue or respond meaningfully at the summary judgment hearing, where in any event, the district court did not apply the correct preclusion doctrine. In the Ninth Circuit and other circuits, issue preclusion is a matter of law reviewed de novo; careful analysis is necessary to determine whether it has been properly applied. *See, e.g., McQuillon v. Schwarzennegger,* 369 F.3d 1091, 1096 (9th Cir. 2004); *United States v. Weiss,* 467 F.3d 1300, 1308 (11th Cir. 2006).

This *sua sponte* decision, and the Ninth Circuit's affirmance, has precluded consideration of the relief GEC sought in federal court: to enjoin Respondents from continuing their tribal court enforcement efforts against non-Indian assets within the exterior boundaries of the Blackfeet reservation. Pet. 6-7; Pet. App. 16a. In its Question Presented and Opposition, Respondents would have this Court believe the only issue is whether GEC may challenge for a second time the tribal court's subject matter jurisdiction: "[w]hether labeled '*res judicata*' or 'issue preclusion', the petitioner is not entitled to revisit subject matter jurisdiction or collaterally attack the decision . . .on subject matter jurisdiction." Opp. 6. The Opposition does not meaningfully refute any of GEC's cogent arguments why issue preclusion is not appropriate.

So far as GEC is aware, where a federal court has declined to recognize and enforce a tribal judgment for lack of due process, no federal court has decided that the losing party is nonetheless entitled to pursue enforcement against non-Indian assets *in the tribal court*, the very court whose proceedings lacked due process. Whether such an issue is barred by issue preclusion is squarely before this Court.

GEC contends that the tribal court's subject matter jurisdiction to order enforcement of the defective judgment has not only not been decided, but is nonwaivable and may be brought at any time. "Because tribal court jurisdiction is an issue of subject matter jurisdiction, it may not be waived, and Town Pump may raise the issue at any time during the suit." *Town Pump v. LaPlante,* 2010 WL 3469578, *1 (9th Cir. Sept. 3, 2010); *accord, Nevada v. Hicks,* 533 U.S. 353, 373 (2001)(challenges to tribal court jurisdiction "would presumably be nonwaivable"); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1228 (9th Cir. 1989)("a party cannot waive by consent or contract a [tribal] court's lack of subject matter jurisdiction"). While Respondents argue GEC "abandoned" the jurisdictional issue, Opp. 2, waiver is defined as "[t]he voluntary relinquishment or *abandonment* . . . of a legal right[.]" *BLACK'S LAW DICTIONARY* 1574 (7th Deluxe ed. 1999)(emphasis added). Thus GEC's right to question the tribal court's subject matter jurisdiction to order enforcement is not waived by allegations of "abandonment." Again, no determination of this issue was necessary – or made – in *Bird;* the only issue was whether *the federal court* should recognize and enforce the judgment. The subject matter jurisdiction of the tribal court to order

enforcement of its defective judgment has never been litigated to a final decision. It cannot be precluded.

In the Indian Civil Rights Act of 1968 (ICRA), Congress directs: "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8). Section 1302(8) incorporates this language from the Fifth Amendment. Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective,* 76 N. DAK. L. REV. 311, 363 n.18 (2000). The Blackfeet tribal courts adopted Anglo-Saxon law and procedures. *Bird,* 255 F.3d at 1143-44 & n.13; SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS–THE COSTS OF SEPARATE JUSTICE* 17 (1978). Consequently, there is no concept or notion of Blackfeet due process that differs from this Court's concept of due process. Blackfeet decisions extol due process for litigants in their courts. *See, e.g., Brown v. Schlact,* No. 95-CA-40 ("the Court is . . . compelled to consider the fairness to all parties . . . under long-standing principles of justice embraced by the Blackfeet Code and Constitution"). Pet. App. 248a. "[T]he avowed aspiration of the [Blackfeet] chief judge is that the court be 'just like the regular [white] courts.'" BRAKEL, *AMERICAN INDIAN TRIBAL COURTS–THE COSTS OF SEPARATE JUSTICE* 70. There is no reason to defer to any Blackfeet due process notion, because there is none. The closing argument here was in contravention of all parties' notions of due process.

Because there is no separation of Blackfeet/Anglo-Saxon due process, and given Congress's mandate that non-Indians must be afforded due process in tribal courts, this Court's decision in *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 69-72 (1978) – that the sole remedy for a due process violation in tribal court is habeas review of the legality of detention – might be revisited. GEC was precluded from making such an argument because of the *sua sponte* ruling and the Ninth Circuit's affirmance. Pet. App. 1a-3a.

Given the Congressional mandate of due process and the acknowledged Blackfeet adoption of Anglo-Saxon law, a federal court may declare GEC's due process rights in tribal court and consider whether Respondents should be enjoined from enforcing the judgment against the assets of a non-Indian corporation on non-Indian fee land and/or Congressionally granted utility rights-of-way, *including collecting payments due* for electricity that is administrated, generated, and transmitted on non-Indian land. This is a question of federal law, just as are federal determinations of tribal jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 857 (1985)("§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction"). This Court recognizes "Congress's desire to extend the [IRCA's] guarantees to non-Indians if and where they come under a tribe's . . . *civil jurisdiction.*" *Oliphant v. The Suquamish Indian Tribe,* 435 U.S. 191, 196 n.6 (1978)(emphasis added). If that is true, and Blackfeet due process is identical to this Court's due process, why should habeas relief be the only remedy for a violation of 25 U.S.C. § 1302(8)?

This Court should settle this law by granting the Petition to enable consideration of the real issues this case presents, either by considering them in this Court

as a matter of law, or by remanding for a lower federal court to decide in the first instance.

II.

REVIEW OF THE NINTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW THAT THE CIRCUIT HAS DECIDED IN CONFLICT WITH OTHER CIRCUITS AND RELEVANT DECISIONS OF THIS COURT

This Court holds that issue preclusion must be analyzed in light of past and current facts, as well as recent precedent and Constitutional concerns, to determine if it is applicable and – even if it is – whether there are special circumstances *not* to apply it. *See* Pet. 10-29. The district court and Ninth Circuit did not do so. Instead, both courts treated preclusion as self-evident because GEC did not appeal the tribal jurisdiction, when an appeal based on due process clearly was sufficient for purposes of comity. *Ipso facto*, these courts concluded the tribal court may enforce its judgment because all other issues are precluded. When federal appellate courts issue dispositions on issue preclusion, usually the analysis is thorough. *See, e.g., Irvin v. United States,* 335 Fed. Appx. 821 (11th Cir. 2009).

In contrast, this Court holds that jurisdiction is a *separate* question from what relief, if any, is available. *Davis v. Passman,* 442 U.S. 228, 239 n.18 (1979); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers,* 390 U.S. 557, 561 (1968). This precedent should be especially true where the Congressionally-mandated due process was lacking,

and where the district court's *sua sponte* order gave GEC no chance to be heard on the question of issue preclusion, further violating GEC's due process rights. *California Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 180-81 (9th Cir. 1974).

In the usual case, even if there is jurisdiction, a judgment rendered without due process may not be enforced; it is void. *Espinoza v. United Student Aid Funds,* 553 F.3d 1193, 1202 (9th Cir. 2008). Jurisdiction and due process are the *sine qua non* of federal court recognition and enforcement of tribal judgments in comity proceedings. *Wilson v. Marchington,* 127 F.3d 805, 810 (9th Cir. 1997). If this Court holds that a tribal judgment may be declared null and void for lack of jurisdiction, *Plains,* 128 S. Ct. at 2717, this Court should also be able to decide whether a tribal judgment may be declared null and void for lack of due process, especially where no deference is indicated. Short of requesting a declaration that such a judgment is null and void, GEC should still have the *opportunity* to argue that a federal court may enjoin Respondents from pursuing their enforcement efforts in tribal court. *Cf. Burrell v. Armijo,* 456 F.3d 1159, 1166, 1170-73 (10th Cir. 2006)(Tenth Circuit concludes, unlike the Ninth Circuit here, that issue preclusion does not bar consideration of the merits where there is a fundamental lack of due process).

What is more, even if GEC had appealed tribal subject matter jurisdiction to try the case under the *Montana* exceptions in *Bird* and lost, that would have no effect on the determination that the tribal court trial lacked due process. The same questions posed here would remain. And, since Respondents are

seeking non-Indian assets on non-Indian land and Congressionally-mandated rights-of-way within the exterior boundaries of the reservation, and seeking to seize payments due for electricity transmitted on those rights-of-way, there is a conflict with this Court's decision in *Plains*. *Plains* holds that the *Montana* exceptions do not grant tribes automatic regulatory or adjudicatory authority over a non-member, and especially not on non-tribal land where, even now, this tribal enforcement is taking place. 128 S. Ct. at 2722.

III.

MISSTATEMENTS OF FACT AND LAW

Respondents claim no argument was made post-judgment to the Blackfeet appeals court regarding lack of due process *in closing argument*. Opp. 1. This implies there was no fair opportunity for the appellate court to consider GEC's due process concerns. But, Paragraph 25 of the Notice of Appeal to the Blackfeet Appellate Court states: "*The entire proceedings* were conducted in such a fashion as to violate the Co-op's rights to procedural and substantive due process." Reply App. 7a. This encompasses the closing argument. And, the Notice of Appeal states that the damages appear "to have been given under the influence of passion or prejudice," Reply App. 6a, para. 18, and challenges the "all-Indian jury in violation of the Co-op's rights to due process and equal protection of the law." Reply App. 4a, para. 11. GEC's Opening Brief in that appeal discusses not only the all-Indian jury, but the due process requirements of section 1302(8) as well. Reply App. 10a-12a. The Brief points out that Respondents' attorney elicited improper opinions "that GEC and its manager Bill Chapman are

racists," Reply App. 12a, which came through loud and clear in the closing argument quoted at length in *Bird*, 255 F.3d at 1149-50. Five pages of the Opening Brief (Reply App. 14a-18a) are devoted to the damages awarded and the fact they could only have resulted from passion and prejudice, concluding:

> [T]here can be little doubt that the highly inflammatory manner in which the plaintiffs' attorney tried the case was designed to achieve exactly this result. The plaintiffs were aided in no small part in achieving this result by the trial court's failure to sustain GEC's repeated objections to the immaterial, incompetent, speculative and highly prejudicial evidence plaintiffs relied upon to prove that RACISM was the motivation behind all of GEC's actions.

Reply App. 16a-17a. Finally, the Conclusion to the Opening Brief leaves no doubt that the Blackfeet appellate court had notice of GEC's due process argument concerning the entire trial, including closing argument:

> From start to finish, the trial court proceedings in this case were handled in such a manner as to deprive GEC of the fundamental right to a fair trial. . . . Judge Sellars consistently failed to apply the law in an evenhanded fashion, so that the result would be one which both sides in this action would consider to be fair and just.

Reply App. 18a-19a.

Respondents argue GEC raised no "special circumstances" arguments before the district court.

Opp. 2-3. But, *Respondents* made no arguments there regarding issue preclusion, and this ball was in their court. That is why the district court made its *sua sponte* "res judicata" ruling, albeit with the wrong preclusion doctrine. *See Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984)(explaining the difference between preclusion doctrines). This Court has applied the "special circumstances" exception specifically to issue preclusion. *Montana v. United States*, 440 U.S. 147, 162-63 (1979). Thus, because Respondents did not argue issue preclusion at all, there was no occasion for GEC to bring up the special circumstances exceptions – including border security – until it challenged the district court's *sua sponte* ruling on appeal. What is more, the affidavit of GEC's manager quoted in GEC's Petition at 27-28 explaining this danger was attached to GEC's Complaint for Injunctive and Declaratory Relief. Pet. App. 151a-152a. Respondents' statement that this was "not raised before the district court" is false. Opp. 7.

Respondents claim the Complaint for Injunctive and Declaratory Relief did not raise any due process grounds. Opp. 2-3. This assertion is also false. Not only did GEC argue the lack of due process given the decision in *Bird*, Pet. App. 144a-145a, paras. 15 & 16, but it also requested relief on those due process grounds. Pet. App. 150a, para. 2. This correction also applies to Respondents' argument that Paragraph 28 of the Complaint makes it clear that only subject matter jurisdiction is challenged. Opp. 3.

Finally, Respondents claim that they sought "and obtained a declaration that the policy of insurance would apply to the judgment entered against petitioner." Opp. 7. However, that action for a

declaratory judgment was filed in tribal court. GEC and the insurer, Federated Rural Electric Insurance Cooperative ("Federated"), moved to dismiss for lack of jurisdiction, among other things. That motion to dismiss was never decided. Instead, the tribal court granted summary judgment in favor of coverage. In 1994, Federated timely filed a notice of appeal, but the appeal has never been acted upon. All of this information was before the district court in GEC's Brief in Support of Plaintiff's Motion for Summary Judgment, filed August 4, 2008, including citations to the relevant records in the tribal court. Reply App. 21a-22a. Thus, the matter of insurance coverage – while completely irrelevant to the issues here – is not as simple as Respondents would have this Court believe.

CONCLUSION

"A federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *National Farmers Union*, 471 U.S. at 853. This determination is abrogated when it is erroneously assumed that issue preclusion bars review of: (1) whether a tribal court has jurisdiction to enforce a judgment despite the lack of due process; (2) whether that court has jurisdiction to order seizure of non-Indian assets on non-Indian land and payments due from the administration, transmission, production, and provision of electricity over non-Indian land; and (3) whether, in the exercise of that jurisdiction, the tribal court threatens the security of the U.S./Canada border by ordering seizure of payments for electrical service where Respondents admit that "[a] majority of the individual customers of Glacier Electric Cooperative are members of the Blackfeet Tribe and

reside within the exterior boundaries of the Blackfeet Reservation" and that "[a]pproximately eighty percent (80%) of [GEC's] members are individuals and businesses that reside on the Blackfeet Reservation." Opp. 1. It is surely obvious that seizure of payments will severely hamper GEC's ability to provide electricity to the border stations, if not prevent it outright.

This Court should grant the Petition so that it may be determined whether Blackfeet tribal enforcement of a judgment rendered without due process is an unlawful exercise of tribal court judicial power. GEC has a right to be protected against such an unlawful exercise of tribal authority.

Respectfully submitted,

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APPENDIX 1

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**IN THE BLACKFEET TRIBAL COURT
FOR THE BLACKFEET INDIAN
RESERVATION
BROWNING, MONTANA**

NO. 92-CA-259

[Filed June 2, 1993]

RON BIRD, HERB GILHAM and SCOTT SHERBURNE, individually and on behalf of Glacier Construction, Inc., Plaintiffs,	)
-vs-	)
GLACIER ELECTRIC COOPERATIVE, INC., Defendant.	)

NOTICE OF APPEAL

Notice is hereby given that Glacier Electric Cooperative, Inc. ("the Co-op"), defendant above-named, hereby appeals to the Blackfeet Tribal Court of Appeals from the final judgment entered in this action on the 19th day of May, 1993. Grounds for this appeal are that:

1) The trial Court erred in denying the Co-op's motion for the substitution of a non-Blackfeet Tribal judge to hear this matter, because all Blackfeet Tribal judges are consumer-members of the Co-op, and thus it was inappropriate to have such persons adjudicate a matter which has the potential of having a direct financial impact on a cooperative of which such judges are consumers and/or members;

2) The trial Court erred in denying the Co-op's motion to dismiss based on insufficiency of service of process, because the Summons and Complaint were simply mailed to the Co-op instead of being served in the manner prescribed by the Blackfeet Tribal Law & Order Code;

3) The Trial Court erred in denying the Co-op's motion to dismiss based on lack of personal jurisdiction over the Co-op, because the Tribal Court lacks jurisdiction over a Montana Rural Electric Cooperative which is not a member of the Tribe and has its principal place of business off of the reservation;

4) The trial Court erred in denying the Co-op's motion to dismiss based on lack of subject matter jurisdiction, because the Tribal Court lacks jurisdiction

over a contract-based controversy involving a dispute between a Montana cooperative and a Montana corporation, when neither of which are members of the Tribe;

5) The trial Court erred in denying the Co-op's motion to dismiss based on the individual plaintiffs' failure to state any claim for said individuals upon which relief can be granted, because the individual plaintiffs have no standing to sue by virtue of their ownership interests in Glacier Construction, Inc.;

6) The trial Court erred in denying the Co-op's motion to dismiss based on the corporate plaintiff's failure to state any claim for said corporation upon which relief can be granted, because:

a) There is no private right of action arising under the Blackfeet TERO, particularly where the plaintiffs have failed to exhaust their administrative remedies;

b) The factual allegations of the complaint fail to make out a sufficient case for breach of contract;

c) The factual allegations of the complaint fail to make out a sufficient case for negligent misrepresentation;

d) The factual allegations of the complaint fail to make out a sufficient case for constructive fraud; and

e) The factual allegations of the complaint fail to make out a sufficient case for defamation;

7) The trial Court erred in denying the Co-op's Motion for Reconsideration of the September 1, 1992, Order denying the Co-op's motions to dismiss, because the Court failed to take consider the Co-op's reply brief in support of those motions prior to issuing its decision, and because the motions to dismiss were all meritorious;

8) The trial Court erred in denying the Co-op's motion for summary judgment because there is a forum selection clause contained within the identified written contract between the Co-op and Glacier Construction, Inc., which clause mandates that any dispute between the Co-op and Glacier Construction will be heard in the Montana Ninth Judicial District Court, to the exclusion of any other forum, including this Tribal Court;

9) The trial Court erred in allowing plaintiffs to litigate their claims against the Co-op without first exhausting the administrative remedies mandated by TERO;

10) The trial Court erred in allowing plaintiffs to litigate an independent right of action for an alleged violation of Article VII, Section 2 of the Blackfeet Constitution, by improperly determining that an independent right of action exists for claimed Constitution violations;

11) The trial Court erred in overruling the Co-op's objection to the all-Indian jury in violation of the Co-op's rights to due process and equal protection of the law;

12) The trial Court made numerous errors on evidentiary rulings at trial, including but not limited to, its decisions to:

a. overrule the Co-op's objection to plaintiffs eliciting personal opinions from witnesses David Azure, Don white, Scott Sherburne, Jack Kelly, Ron Bird, Herb Gilham, Bill Aubrey, Merle "Jeep" McGee and Bob Gervais;

b. overrule the Co-op's objection to plaintiffs eliciting legal conclusions from witness Don White;

c. overrule the Co-op's objection to rebuttal testimony by witness Bob Gervais; and

d. overrule the Co-op's objection to plaintiffs introducing Tribal laws and ordinances into evidence.

13) The trial Court erred in granting plaintiffs' request for a jury view and in so doing, allowed the jury to receive and consider unsworn testimony and other evidence which was irrelevant and unfairly prejudicial to the Co-op;

14) The trial Court erred in denying the Co-op's motion for a directed verdict dismissing one or more of the counts to plaintiffs' complaint;

15) The trial Court erred in giving the jury instructions which reflected the source of each such instruction and the identity of the party which proposed each such instruction;

16) The trial Court erred in giving the jury instructions Nos. 13, 14, 16, 17, 18, 19, 20, 21, 22, 23,

24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58, in that said instructions are not correct statements of the law and/or said instructions were not applicable to the case in light of the evidence presented at trial and the applicable law;

17) The trial Court erred in refusing the Co-op's proposed instruction Nos. 14, 15, 16, 17, 18, 19, 20, 22, 24, 25, 27, 28, 29, 30, 32, 33, 39, 40, 41, 43, 44, 49, 51, 54, 58, 60, 62, 64 and 67, in that said instructions were correct statements of the law, and the failure to give such instructions deprived the Co-op of the right to have the jury fully instructed on the applicable law;

18) The damages awarded by the jury are excessive and appear to have been given under the influence of passion or prejudice;

19) There was insufficient evidence presented at trial to justify the verdict;

20) The trial Court erred in denying the Co-op's Motion to Stay Entry of Judgment and entering judgment without first completing the punitive damages review procedures set forth in § 27-1-221, MCA;

21) The punitive damages awarded by the judge are excessive and appear to have been given under the influence of passion or prejudice;

22) There was insufficient evidence presented at trial to justify the judge's decision to enter judgment on the verdict, and such judgment is against the law;

23) The trial Court erred in assessing "costs of the jury" and "jury/court costs" against the Co-op in the sum of $11,125.00;

24) The Co-op's has been deprived of the right to full political participation in the Blackfeet Indian Reservation, and thus should not and cannot be compelled to be subject to the authority of the Blackfeet judicial system;

25) The entire proceedings were conducted in such a fashion as to violate the Co-op's rights to procedural and substantive due process; and

26) Any other grounds which may become apparent upon a review of the transcript.

DATED this 2nd day of June, 1993.

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[*Certification of Service of Mail Omitted in Printing of this Appendix*]

APPENDIX 2

NO. 92-CA-269
NO. 93-AP-18

IN THE COURT OF APPEALS
FOR THE BLACKFEET INDIAN RESERVATION

[Dated September 20, 1993]

RON BIRD, HERB GILHAM and SCOTT SHERBURNE, individually and on behalf of GLACIER CONSTRUCTION, INC.

Plaintiffs and Respondents,

-vs-

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

APPEARANCES:

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action, with an instruction to the plaintiffs to refile their case in state district court in Cut Bank.

Moreover, since, as noted above, the dispute is between a Montana corporation and a Montana cooperative, it is altogether appropriate that the dispute be heard in a Montana state court. That court is, fundamentally, the most appropriate forum. Hence, the clause was altogether fit and proper. It should have been honored.

ISSUE NO.7: THE USE OF AN ALL-INDIAN JURY PANEL VIOLATED GEC'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW

On the first day of trial, prior to jury selection, the Co-op objected that jury panel drawn for the case did not represent a cross-section of the community,

because it was made up entirely of enrolled members of the Blackfeet Tribe.[15] As such, the panel violated the Co-op's due process and equal protection rights as guaranteed by the United States Constitution and the Indian Civil Rights Act.[16] Judge Pete Sellars clearly erred in overruling the Co-op's objection.[17]

In 1968, Congress enacted Title I of the Indian Civil Rights Act, 25 U.S.C. § 1301 – 1303. Section 1302 of the Act states that:

> No Indian Tribe in exercising powers of self-government shall:
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> * * *
>
> (8) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . . .

Paragraph (8) of 25 U.S.C. § 1302 specifically prohibits a tribal Court from denying equal protection of its laws and due process to any party subject to its jurisdiction, whether Indian or non-Indian. Duro v. Reina, 851 F.2d 1136 (9th Cir. 1987).

The Indian Civil Rights Act is modeled after the Constitution of the United States, and is to be interpreted in light of U.S. Constitution law decisions. Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th

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[15] A copy of the list of jury panel members is attached to this brief as Exhibit "D."

[16] Tr. p. 10, ln.9 through p. 11, ln. 6.

[17] Tr. p. 12, ln. 14-15.

Cir. 1976). Accordingly, equal protection and due process analysis used for jury selection in federal courts is applicable to the present case.

The rights of a party to equal protection and due process in jury selection under the Federal Constitution are derived from two principle sources. The due process guarantee is embodied in the Sixth and Fourteenth Amendments, which provide that a party is entitled to a jury drawn from a representative cross section of the community. Duren v. Missouri, 439 U.S. 357, 58 L.Ed.2d 579, 99 S.Ct. 664 (1979). The equal protection guarantee is embodied in the Fifth and Fourteenth Amendments, which prohibit the

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F.R.Civ.P. None of these witnesses had a factual basis to be able to provide an opinion on what motivated Bill Chapman to act in the manner in which he did. Yet each was permitted – over objection – to do so.

Finally, and perhaps most importantly, the opinions elicited by Glacier Construction's attorney were inadmissible because they were unfairly prejudicial. Rule 403, F.R.Civ.P. provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Here, the opinions elicited by Glacier Construction's attorney that GEC and its manger Bill Chapman are racists were clearly unfairly prejudicial, and should have been excluded.

By refusing to exclude irrelevant, immaterial, incompetent, and unfairly prejudicial testimony by plaintiffs' witnesses, Judge Sellars deprived GEC of

the fundamental right to a fair trial, and the judgment should be reversed accordingly.[26]

* * *

Under the foregoing principles, the "economic rights" provision in Sec. 2 of Article VIII of the Blackfeet Tribe's constitution is not self-executing. As a first point, those "economic rights" are not defined. It makes no sense to expose anyone – be he Indian or non-Indian – to liability for violating someone else's rights, when that person has no idea how extensive the rights are or, for that matter, what sort of conduct will be viewed as violating those rights.

Indeed, the clearest proof that Sec. 2 of Article VIII is not self-executing is the fact that the Tribal Council itself saw need to enact TERO. Of course, when the Tribal Council did so, it chose (as was noted previously) not to provide just the sort of private enforcement mechanism which the plaintiffs here think that they can create out of thin air.

Judge Sellars erred in instructing the jury to rule on the question of whether GEC violated the plaintiffs' right to economic self-determination. The Blackfeet

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[26] Ironically, when the Co-op tried to rebut the opinions of plaintiffs' witnesses with testimony that the Co-op was not racist, Glacier Construction's attorney repeatedly objected on the grounds of speculation and foundation. (Tr. 1225-26). Although the trial court recognized that it had to allow GEC to ask its witnesses whether they felt the Co-op was racist since plaintiffs had done opened the door or this issue, such rebuttal obviously did little to overcome the unsubstantiated allegations of racism made by plaintiffs in their case-in-chief.

constitutional provision upon which that right is based is not a self-executing provision, and therefore that provision could not be the basis for an independent cause of action.

ISSUE NO. 16: THE DAMAGES AWARDED BY THE JURY ARE EXCESSIVE AND APPEAR TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE

The jury in this case awarded the plaintiffs compensatory damages in the amount of $1,382,181.60 for lost profits, plus another $750,000.00 in punitive damages. These amounts were clearly excessive, and appear to have been given under the influence of passion or prejudice.

The only evidence introduced at trial on the issue of damages was Scott Sherburne's testimony that the present value of Glacier Construction's lost profits over a twenty year period into the future was $900,000.00. (Tr. 723). This highly speculative figure was based on the assumption that if the Co-op would have honored its legal obligations to Glacier Construction, Glacier Construction would have obtained the funding it needed to buy new equipment, hire the qualified lineman it was lacking, and transform itself into a highly profitable business. Thus, the compensatory damage award of nearly $1.4 million dollars in compensatory damages alone was approximately fifty percent higher than plaintiffs themselves believed they were entitled to.

Though the amount of compensatory damages is solely within the providence of the jury, the jury is not given carte blanche; rather, some substantial evidence

must exist upon which the award may be predicated. Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 500 P.2d 397 (1972); Bottrell v. American Bank, supra, 773 P.2d at 707. Similarly, to sustain any award of punitive damages at all for the sake of example and by way of punishing the defendant, there must be clear and convincing evidence in the record that the defendant acted with actual fraud or actual malice toward the plaintiff. 27-1-221, MCA.

In Bottrell, supra, the plaintiffs suing a bank for negligent misrepresentation claimed that as a result of the bank's actions, they suffered $312,000.00 in compensatory damages. However, in its verdict the jury awarded compensatory damages totalling $500,000.00. The Montana Supreme Court held that since there was no evidence to support the verdict, the compensatory damage award could not stand. Id. at 708.

The same reasoning applies in the case at bar. The compensatory damage figure most favorable to the plaintiffs found in the evidence is $900,000.00, without even taking into the extent to which plaintiffs have mitigated their damages as a result of doing alternative work. A plaintiff has a duty to mitigate his damages, and such mitigation must be taken into account by the jury in calculating a compensatory damage award. See e.g., McPherson v. Kerr, 195 Mont. 454, 636 P.2d 852 (1981). In the present case, Scott Sherburne testified that he is now earning $36,000.00 per year working for the Blackfeet Housing Authority, which is far more than he made at Glacier Construction. (Tr. 733). Similarly, Ron Bird testified that he is now working as a transportation director for the Blackfeet Tribe (Tr. 929), while Herb Gilham

testified that he is now bartending. (Tr. 1112). Thus, for the jury award even the full $900,000.00 in lost profits claimed by the plaintiffs would be excessive, since plaintiffs clearly have been able to mitigate their damages to a significant degree.

Since there was no evidence introduced at trial to support the compensatory damage award anywhere approaching $1.4 million, that award cannot stand.

Similarly, there was a complete absence of "clear and convincing evidence" that GEC acted with actual fraud or actual malice in its dealings with Glacier Construction. Although plaintiffs speculated that GEC was plotting to put it Glacier Construction out of business because it did not want an Indian owned contracting firm to succeed, the evidence showed that GEC actually afforded Glacier construction special treatment such as allowing twice monthly billings by Glacier construction (Tr. 569, 580), and giving Glacier Construction more than one chance to submit prices on project. (Tr. 580, 741-43).

The fact that the jury awarded compensatory damages which far exceeded plaintiffs' actual provable damages, and the fact that the jury assessed punitive damages at all, indicates that such the verdict was influenced by passion or prejudice on the part of the jury. Indeed, there can be little doubt that the highly inflammatory manner in which the plaintiffs' attorney tried the case was designed to achieve exactly this result. The plaintiffs were aided in no small part in achieving this result by the trial court's failure to sustain GEC's repeated objections to the immaterial, incompetent, speculative and highly prejudicial

evidence plaintiffs relied upon to prove that RACISM was the motivation behind all of GEC's actions

ISSUE NO. 17: THE TRIAL COURT ERRED IN REFUSING TO FOLLOW THE PUNITIVE DAMAGE REVIEW PROCEDURES MANDATED BY § 27-1-221, MCA

The patently unfair assessment of punitive damages against GEC could have, and should have, been handled at the trial court level by Judge Sellars. However, Judge Sellars refused to follow the mandatory punitive damages review procedures found in the applicable law.

The Blackfeet Tribal Law & Order Code contains no procedural rules for assessing punitive damages in civil actions such as the present. The only reference to punitive damages which exists in the Code is found at Chapter 2, Sec. 3 of the Blackfeet Tribal Law & Order Code, which states simply that "Where the injury was deliberately inflicted, the judgment may include an additional penalty upon the defendant. . . ."[30]

In the absence of Tribal procedural rules for assessing punitive damages in this action, the Court chose to follow state law in instructing the jury on the issue punitive damages. The instructions given by the Court to the jury on the issue of punitive damages were based directly on the

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[30] Interestingly, pursuant to Ch. 2, Sec. 3, the punitive damages penalty assessed against the defendant do not automatically go to the plaintiff. Instead, they "may run either in favor of the injured party or in favor of the Blackfeet Tribe."

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ISSUE NO. 18: THE TRIAL COURT ERRED IN ASSESSING "COSTS OF THE JURY" AND "JURY/COURT COSTS" AGAINST GEC EXCEEDING $11,000.

To add insult to injury, the judgment Judge Sellars signed contained an assessment of more than $11,000.00 against GEC for "costs of the jury" and "jury/court costs." This was in addition to the "costs" claimed by the plaintiffs and awarded by the court. GEC has no idea what "costs of the jury" and "jury/court costs" judge Sellars is referring to, since he never bothered to explain in the judgment where they came from, or how they were calculated. Clearly, it was error for Judge Sellars to attempt to make GEC responsible for "costs of the jury" and "jury/court costs" for such an enormous amount, without even giving GEC any notice what it was being expected to pay for.

V.

CONCLUSION

From start to finish, the trial court proceedings in this case were handled in such a manner as to deprive GEC of the fundamental right to a fair trial. Mere words cannot express the dismay GEC and its attorneys have experienced as a result of the errors of judgment made by Judge Sellars, on essentially every single substantive legal issue he was faced with. From the Motion to Substitute Judge to the Motion to the Motion to Stay Entry of Judgment pending review of the punitive damages, Judge Sellars consistently failed to apply the law in an evenhanded fashion, so that the

result would be one which both sides in this action would consider to be fair and just.

Luckily, there is a means available under Tribal law for seeking relief from the injustices that have occurred. Because trial courts will sometimes make errors, the Tribal Council has organized this Court of Appeals to review decisions of the trial courts and reverse those decisions when justice so requires. This case is one where justice does require reversal of the trial court's decisions, and the judgment based on those erroneous decisions, on the multitude of grounds set forth above.

DATED this 20th day of September, 1993.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CAUSE NO: CV-08-30-GF-SEH

[Dated August 4, 2008]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
Plaintiff,	)
-vs-	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier	)

Construction, Inc.,)
)
Defendants.)
_____)

BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case involves the question of whether the Blackfeet Tribal Court has jurisdiction over commercial litigation against Glacier Electric Cooperative, Inc. (the Co-op) which led to a multi-million dollar judgment that the Ninth Circuit Court of Appeals has found to be unenforceable because the tribal court proceedings were

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with the jurisdictional analysis upon which this case turns. However, to ensure that the Court is not misled about the role insurance does or does not play in this case, the Co-op would add the following background facts regarding that issue.

In January, 1994, while the underlying tribal court case was on appeal in the tribal court system, the Defendants herein and their wives filed a second tribal court action, against the Co-op and its insurer, Federated Rural Electric Insurance Cooperative (Federated), seeking a declaration that there is insurance coverage available for their judgment against the Co-op. Plaintiff's Statement of Genuine Issues, ¶ 53. Both Federated and the Co-op moved to dismiss, for lack of jurisdiction, among other bases. Id.

at ¶ 54. The Defendants opposed those motions, and filed a motion for summary judgment on the coverage issue. Id. at ¶ 55. Without deciding the motions to dismiss, tribal court judge Don Sollars signed an order on September 12, 1994, drafted by counsel for the Defendants, granting them summary judgment on coverage. Id. at ¶56.[1] Federated timely filed a Notice of Appeal to the Blackfeet Court of Appeals in 1999, but the appeal has never been acted upon. Id. at ¶ 57. Thus, the matter of insurance – while completely irrelevant to the jurisdictional analysis – is not as simple as the Defendants would have the Court believe.

* * *

[1] Judge Sollars is the same judge who ruled in 1988 that the Blackfeet Tribe did not have authority to impose taxes on the Co-op. Plaintiff's Statement of Undisputed Facts, ¶¶ 47 and 56. He is also the tribal court judge who recently issued orders in the original tribal court action assisting the Defendants in their efforts to enforce the judgment. Id. at ¶¶ 41, 44, 45, 45, 52 and 56.